No. 75-679

In the Supreme Court of the United States

OCTOBER TERM, 1975

INTERNAL REVENUE SERVICE, PETITIONER

v.

FRUEHAUF CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Internal Revenue Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the district court (Appendix A, *infra,* pp. 1A–6A) is reported at 369 F. Supp. 108. The subsequent injunctive order of the district court is set forth in Appendix A, *infra,* pp. 7A–12A. The opinion of the court of appeals (Appendix B, *infra,* pp. 13A–27A) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1975 (Appendix C, *infra,* p. 28A). A

timely petition for rehearing was denied on August 8, 1975 (Appendix D, *infra,* p. 29A).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Exemption 3 of the Freedom of Information Act bars disclosure of "matters that are * * * specifically exempted from disclosure by statute." The question presented is whether this exemption covers Internal Revenue Service technical advice memoranda, letter rulings, and other related files because of the prohibition against public inspection of tax returns provided by 26 U.S.C. 6103, where such documents contain information which is either part of or related to returns filed by particular taxpayers.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Freedom of Information Act, 5 U.S.C. 552; Section 6103 of the Internal Revenue Code of 1954 (26 U.S.C.); and Treasury Regulations on Procedure and Administration, Section 301.6103(a)–1, are set forth in Appendix E, *infra,* pp. 30A–32A.

STATEMENT

Respondents are defendants in a criminal prosecution in the United States District Court for the Eastern District of Michigan. They are charged with: (1) conspiring to defeat the assessment of the federal manufacturer's excise tax imposed by Section

4061 of the Internal Revenue Code of 1954 (26 U.S.C.); (2) attempting to evade excise taxes of $12,344,587, in violation of 26 U.S.C. 7201; and (3) aiding in the preparation of materially false and fraudulent excise tax returns, in violation of 26 U.S.C. 7206(2). During pretrial discovery proceedings, respondents sought to obtain from the government documents (in the possession of the Internal Revenue Service) which they claimed would supply information essential to their defense. The government contended that such materials were not subject to discovery[1] (Appendix A, *infra,* pp. 1A–2A).

Respondents thereupon brought this suit under the Freedom of Information Act (FOI Act), 5 U.S.C. 552, seeking copies of documents prepared by the Internal Revenue Service from January 1, 1947 to September 13, 1973, in connection with its determinations whether particular vehicles were subject to the manufacturer's excise tax, and its computation of the sales price of such vehicles under Section 4216 of the Code. Specifically, respondents seek technical advice memoranda, unpublished letter rulings, related correspondence and index systems, and Internal Revenue Service files relating to the issuance of 23 different published revenue rulings (Appendix A, *infra,* pp. 2A–3A).

The Internal Revenue Service moved for summary judgment on the ground that the requested documents

[1] After a nonjury trial, respondents were found guilty in July, 1975, and are awaiting sentencing.

were exempt from disclosure under exemption 3 of the FOI Act, 5 U.S.C. 552(b)(3), as "matters that are * * * specifically exempted from disclosure by statute." In support of this motion, the Service relied upon Section 6103 of the Internal Revenue Code of 1954, which provides that tax returns shall be open to public examination only to the extent authorized in rules and regulations promulgated by the President (R. 29).[2]

The district court rejected the claim that the materials were specifically exempt from disclosure by statute. In its view, Section 6103 of the Internal Revenue Code was inapplicable to the documents at issue relating to excise tax returns because "[it] provides for the protection of the privacy of persons filing *Income* Tax Returns" (Appendix A, *infra,* pp. 5A–6A; emphasis in original). The district court thereafter entered an order denying the Internal Revenue Service's motion for summary judgment and enjoining it from withholding the records requested by respondents (Appendix A, *infra,* pp. 7A–12A). The court ordered that the Service make available the records and documents "intact and without deletion, except for those items which * * * [it] submits to the Court * * * sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the Court * * * as to whether the proposed deletions are justified under the Freedom of Information Act * * *" (Appendix A, *infra,* p. 8A).

[2] "R." refers to the record appendix filed in the court of appeals.

The court of appeals affirmed (Appendix B, *infra,* pp. 13A–28A). Although it concluded that the district court erred in construing Section 6103 to bar public inspection of only income tax returns, it held that disclosure of the letter rulings was appropriate because they were not "returns" within the meaning of Section 6103 and therefore did not come within exemption 3 of the FOI Act. While the court acknowledged that certain letter rulings might fall within the definition of "return" under the Presidential regulations promulgated under Section 6103, it concluded, in conformity with *Tax Analysts & Advocates* v. *Internal Revenue Service,* 505 F. 2d 350 (C.A.D.C.), that those Regulations could not "'immunize letter rulings from disclosure under the Freedom of Information Act', beyond that which Congress intended to protect under § 6103. 505 F. 2d at 354, n. 1" (Appendix B, *infra,* p. 20A).

In deciding that the technical advice memoranda sought by respondents did not come within exemption 3, the court of appeals declined to follow the contrary conclusion reached in *Tax Analysts & Advocates, supra,* 505 F. 2d at 355. It considered the scope of the district court's disclosure order with respect to such documents to be more limited than the order in the *Tax Analysts* case. Finally, the court of appeals also observed that the retained power of the district court to make *in camera* deletions from the technical advice memoranda would be sufficient to satisfy the prohibitions against disclosure of Section 6103 (Appendix B, *infra,* pp. 20A–22A).

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REASONS FOR GRANTING THE WRIT

1. In holding that technical advice memoranda and letter rulings[3] were not covered by exemption 3 of the FOI Act as "matters that are * * * specifically exempted from disclosure by statute," the decision below threatens to destroy the longstanding Congressional guarantee of privacy for information contained in or related to the tax returns of countless numbers of taxpayers. If permitted to stand, the court of appeals' decision will severely impair our self-reporting tax system, which depends upon the willingness of each taxpayer to submit voluntarily all information relevant to his tax liability, with the good faith expectation that the Internal Revenue Service will not disclose it to third parties. The invasion of taxpayer privacy presaged by the public disclosure of such Internal Revenue Service documents, of which there are approximately 400,000 extant, presents a question of great importance concerning both the application of the FOI Act and the administration of the revenue laws. A decision with such far reaching impact upon the Internal Revenue Service, the business community, and the public at large calls for review by this Court.

[3] The district court also ordered disclosure of correspondence, index systems, and files relating to the issuance of 23 revenue rulings (Appendix A, *infra*, pp. 10A–11A). While the court of appeals addressed only the technical advice memoranda and letter rulings, its affirmance requires the disclosure of the other material as well. Although we do not separately discuss these other documents, we submit that they are likewise covered by exemption 3 for the same reasons as are technical advice memoranda and lettter rulings.

Moreover, the court of appeals' decision that technical advice memoranda are not covered by exemption 3 squarely conflicts with *Tax Analysts & Advocates* v. *Internal Revenue Service*, 505 F. 2d 350, 355 (C.A.D.C.). The issue has been and continues to be widely litigated,[4] and resolution of the conflict by this Court is essential in order that there be a uniform national rule.

2. Last Term in *Administrator, Federal Aviation Administration* v. *Robertson*, No. 74–450, decided June 24, 1975, this Court held that exemption 3 of the FOI Act was intended to exempt from disclosure material covered by the nearly 100 statutes which restrict public access to government records. As the Court there stated, the FOI Act cannot be read as repealing these statutes by implication. See slip op., pp. 9–11.

Section 6103 of the Internal Revenue Code is such a statute announcing a principle of confidentiality of information in the possession of the Internal Revenue Service by virtue of its function as national tax collector. It provides that with certain exceptions not here relevant,[5] tax returns shall be open to public inspection upon order of the President and in accordance with rules and regulations promulgated by

[4] We are advised by the Internal Revenue Service that since May 1, 1975, it has received more than 75 requests under the FOI Act for disclosure of letter rulings and/or technical advice memoranda. There are also six suits pending in the district courts, some of which involve technical advice memoranda.

[5] See Section 6103(b), (c), and (d), respectively, providing for inspection of returns by state officials, shareholders, and committees of Congress.

the President. This statute encompasses excise tax returns reporting or relating to the same information contained in the documents sought by respondents.[6] It is derived from Section 1 of the Act of June 17, 1910, c. 297, 36 Stat. 468, 494, which provided that tax returns would be open to public inspection "only upon the order of the President under rules and regulations * * * approved by the President." Less than one year earlier, Congress had provided in Section 38 Seventh of the Act of August 5, 1909, c. 6, 36 Stat. 11, 116, that it was unlawful for the Treasury "to divulge or make known in any manner not provided by law any document received, evidence taken, or report made * * * except upon the special direction of the President * * *."[7]

The necessity for such a statutory nondisclosure rule for tax information hardly requires elaboration. As this Court observed more than 75 years ago in *Boske* v. *Comingore,* 177 U.S. 459, 469–470, in upholding the validity of regulations similarly prohibiting the disclosure of Treasury tax records: "The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded." In light of this long-standing policy against the disclosure of information furnished by taxpayers to the Treasury, it is not sur-

[6] Section 6103(a)(2) encompasses, *inter alia*, excise tax returns; Section 6103(a)(1) covers income tax returns.

[7] See also Section IIG(d) of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 116, 177; *United States* v. *Dickey*, 268 U.S. 378, 387.

prising that Section 6103 of the Internal Revenue Code was one of the 100 statutes to which Congress referred in its formulation of exemption 3. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); House Committee Print, Federal Statutes on the Availability of Information, 86th Cong., 2d Sess. 213–214 (1960); Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1666 and 1663 (in part), 88th Cong., 1st Sess., pp. 179–187 (1963). Thus, in the FOI Act Congress intended to preserve the protective scope of Section 6103. *Association of American Railroads* v. *United States,* 371 F. Supp. 114, 116–118 (D. D.C.) (three-judge court). See also *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 218–219.

Given the large variety of documents submitted by taxpayers to the Internal Revenue Service and those prepared by the agency itself in connection with its determinations of tax liability, the nondisclosure principle in Section 6103 could easily be circumvented if it were limited to filed tax return forms. Taxpayers frequently submit additional information either voluntarily or at the request of the Service in order to explain data reported on their returns. Similarly, at the conclusion of an audit, a revenue agent will prepare a report which refers to items on a return. The taxpayer may in turn file a protest to the agent's conclusions.

Although these documents are not physically part of a prescribed tax return form, they all contain in-

formation either already reported in a return or related to items reported in a return. The congressional policy against disclosure of Internal Revenue Service information relating to the liability of a particular taxpayer can be properly effectuated only if the applicability of Section 6103 depends upon the nature of the information sought and not the title of the particular documents on which it is written. Simply put, the private character of the information in a tax return is not altered for purposes of Section 6103 because it is also recorded on other documents as part of the process of determining tax liability.

This principle emphasizing the substance of the information rather than its form has been incorporated in the Presidential regulations promulgated under Section 6103. Under Section 301.6103(a)–1(a)(3) of those Regulations (26 C.F.R.), the term "return" is broadly defined to include—

> (a) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and
>
> (b) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (a) of this subdivision.

By defining "return" to include all documents containing information reported in or related to a return, the Regulations insure that the statutory policy of confidentiality will not be defeated by an overly literal reading of the term "tax return."

In order to effectuate the congressional policy reflected in exemption 3 of the FOI Act to continue the effectiveness of all of the statutes by which Congress had protected the confidentiality of various categories of government documents, Congress intended to protect all groups of documents to which the agencies had applied their nondisclosure statutes. Thus, when Congress in exemption 3 continued the effectiveness of Section 6103 of the Code, it necessarily intended to include the administrative interpretations of the reach of that section. The consistent views and practice of the Executive Branch, reflected in the Presidential regulations, has been that the term "returns" in Section 6103 includes the documents of which respondents here seek disclosure. Exemption 3 therefore covers those documents.

3. In holding that technical advice memoranda and letter rulings were not covered by exemption 3 of the FOI Act, the court of appeals ignored the broad statutory nondisclosure policy expressed in the Presidential regulations. Although technical advice memoranda and letter rulings share common attributes, the error of the court below is best demonstrated by separate analysis of each aspect of its decision.

A. TECHNICAL ADVICE MEMORANDA

Technical advice memoranda are issued to a district director in response to his request for instructions from the National Office as to the correct tax treatment of a specific set of facts relating to a named taxpayer. Such requests arise either in connection with

the audit of a return or consideration of a claim for refund. The reply from the National Office consists of two parts: (1) a transmittal memorandum containing information for the district director which can not be disclosed to the taxpayers; and (2) a technical memorandum of facts and law, a copy of which is generally furnished to the taxpayer. See Statement of Procedural Rules, Section 601.105(b)(5)(vi) (26 C.F.R.).

These memoranda are prepared by the Internal Revenue Service in the context of a factual situation of a specific tax return or claim for refund and they necessarily contain information set forth in that return or claim. In terms of the above-quoted regulation, they are "reports * * * relating to * * * ['* * * returns * * * filed by * * * the taxpayer * * *']." The fact that such information is also set forth on a separate document known as a technical advice memorandum does not justify its public disclosure any more than a revenue agent's report of his audit of a taxpayer could be disclosed to a person other than the taxpayer or his authorized representative. As the District of Columbia Circuit ruled in *Tax Analysts & Advocates* v. *Internal Revenue Service, supra,* 505 F. 2d at 355, "Technical advice memoranda deal directly with information contained in 'returns made with respect to taxes' and are a part of the process by which tax determinations are made and, thus, 'specifically exempted from disclosure by statute.'"

The court below attempted to distinguish the contrary decision of the District of Columbia Circuit in *Tax Analysts* on the ground that "the [district court's] order here most carefully limits disclosure to 'those portions of responses to Technical Advice requests that are or were intended for issuance to taxpayers'" (Appendix B, *infra,* p. 21A). But the court's distinction suffers from two critical infirmities.

First, the injunctive orders in both cases are identical in requiring only the disclosure of the second part of the technical advice memorandum, *viz.,* the part of the memorandum constituting the Service's audit determination. See *Tax Analysts & Advocates* v. *Internal Revenue Service,* 362 F. Supp. 1298, 1310 (D.D.C.). Second, the court's statement that such documents are "intended for issuance to taxpayers" misapprehends the nature of the technical advice procedure. Although it is the practice of the Internal Revenue Service to furnish the affected taxpayer with a copy of its memorandum covering the audit determination, this practice cannot authorize the third-party disclosure approved by the court of appeals. The taxpayer is necessarily privy to the information reported in his own tax return; that knowledge, however, is a far cry from making that information available to others. Finally, the furnishing of a copy of the return of a taxpayer to the taxpayer himself is expressly authorized by Section 301.6103(a)-1(c)

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(1)(ii) of the Presidential regulations. Thus, the Service's practice of furnishing the affected taxpayer with a copy of the audit determination part of the technical advice memorandum does not breach the nondisclosure rule of Section 6103.

B. LETTER RULINGS

Letter rulings are comparable to technical advice memoranda. They are written statements issued to a taxpayer by the National Office of the Internal Revenue Service in which the tax law is applied to a given set of facts. Letter rulings are given with respect to both completed and prospective transactions. When the transaction is subsequently reported in a tax return, the auditing agent simply compares the information on the return with the facts in the ruling. If there is no variance, the conclusion of the ruling will determine the tax treatment of the transaction.

A letter ruling consists of a detailed recital of relevant facts submitted by the taxpayer, setting forth the same type of information contained in a tax return, followed by a statement of conclusions. Such rulings are not published or publicly disclosed. It is established that taxpayers may not rely upon a letter ruling issued to another taxpayer, and that Internal Revenue Service officials may not rely upon or cite such rulings as precedents in the disposition of another case. See Statement of Procedural Rules, Sections 601.201(e)(2) and 601.201 (l)(1); Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity,* 43 Taxes 756, 757, 763–765 (1965).

In concluding that the excise tax letter rulings were not covered by exemption 3, the decision below followed a similar holding with respect to income tax letter rulings in *Tax Analysis & Advocates* v. *Internal Revenue Service, supra,* 505 F. 2d at 351–355. In that case, the court concluded that "letter rulings generated by the voluntary request of a taxpayer for tax advice from the IRS are beyond the scope of that which the Congress sought to protect under section 6103, that is, 'returns' filed under compulsion of law which contain information necessary to determine federal tax liability" (*id.* at 354 n. 1). However, the purported voluntary nature of a ruling request is refuted by the fact that there are many instances in which the Internal Revenue Code requires the issuance of a letter ruling as a condition of a particular tax result. For example, a ruling is required in connection with certain transactions involving foreign corporations (Section 367) and the transfer of appreciated securities to certain foreign entities (Section 1492), and the change of an accounting period (Section 442).[8] In no sense, therefore, are all ruling requests voluntary.

At all events, whether a ruling request is voluntary or mandatory under the Code, the significant fact for purposes of the nondisclosure policy of Section

[8] Other Code provisions requiring the issuance of a ruling as a condition to a particular tax consequence include Sections 446(e), 507(b), 514(b)(3)(A), 4942(g)(2), and 4945(g).

6103 is that it contains information of the same character as that set forth in the taxpayer's return. Just as a technical advice memorandum incorporates information from a tax return in the context of a present audit, a letter ruling sets forth a detailed statement of facts in the context of what is essentially an advance audit. Both documents necessarily include confidential information relating to the taxpayer's profits, expenses, the nature of the taxpayer's business, and the like.

Indeed, the court in *Tax Analysts* acknowledged (505 F. 2d at 354 n. 1) that a ruling involving a subsequently executed transaction required to be reported on a return would "relate" to a return within the meaning of the Presidential regulations under Section 6103. But even with respect to a transaction that may not be executed, the likelihood that the ruling would recite facts that have been or will be reported in the taxpayer's return is sufficiently strong to warrant the application of the statutory nondisclosure rule. The simple act of copying such information onto a separate document should not destroy its statutory guarantee of privacy whether that separate document is called a technical advice memorandum or a letter ruling.

4. Contrary to the court of appeals' decision, the *in camera* inspection procedure ordered by the district court in which the Internal Revenue Service might object to disclosure of specific portions of the documents would not satisfy the terms or policy of the nondisclosure rule of Section 6103. Pursuant to that

provision, the Service is prohibited from disclosing the entire text of its letter rulings and technical advice memoranda and not simply those portions it deems to be confidential.

Moreover, the process of determining which portions of such documents are confidential involves difficult questions of judgment and the Service's conclusions in this regard might well differ from that of the affected taxpayer. Because errors in judgment might irreparably damage the innocent subjects of these documents, fairness suggests that the taxpayer be given an opportunity to object to disclosure and, if necessary, to contest what he believes to be an invasion of his privacy. However, the taxpayer's very act of contesting disclosure would necessarily reveal his identity as the recipient of such documents, and thereby invade the very privacy interest he seeks to protect.

The prospect of such protracted three-cornered proceedings involving the plaintiffs in these suits, the Internal Revenue Service, and affected taxpayers with respect to the approximately 400,000 extant letter rulings and technical advice memoranda, eloquently demonstrates the impracticality of the *in camera* procedure contemplated by the decision below. In providing in exemption 3 for nondisclosure of all matters "specifically exempted from disclosure by statute," Congress did not intend to impose on the lower federal courts the heavy burden of editing this enormous number of documents and the responsibility of insuring taxpayer privacy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1975.

APPENDIX A

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil No. 4-70345

FREUHAUF CORP., a Michigan corporation, WILLIAM E. GRACE, AND ROBERT D. ROWAN, PLAINTIFFS

v.

INTERNAL REVENUE SERVICE, DEFENDANT

MEMORANDUM RE UNLAWFUL WITHHOLDING OF RECORDS

Plaintiffs herein commenced this action by filing their COMPLAINT REQUESTING AN INJUNCTION AGAINST UNLAWFUL WITHHOLDING OF RECORDS AND AN ORDER FOR PRODUCTION OF SUCH RECORDS. The action is brought pursuant to the Freedom of Information Act, 5 U.S.C.A. § 552. Plaintiffs here are defendants in a criminal action (No. 45325) in this court, brought by the United States against them in a one-count indictment that charges a conspiracy to:

> (1) Defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service (IRS) of the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of $12,344,587.31 in Federal Manufacturer's Excise Taxes;
>
> (2) Attempt to evade and defeat (contrary to Section 7201, Title 26, United States Code),

the payment of $12,344,587.31 in Federal Excise Taxes to be due and owing and due and owing to the United States by the FRUEHAUF CORPORATION for the period October 1, 1956, through December 31, 1965:

(3) Aid or assist in, and procure, counsel and advise the preparation and presentation (in violation of Section 7206(2), Title 26, United States Code); of materially false and fraudulent Excise Tax Returns (IRS Form 720) for the defendant FRUEHAUF CORPORATION for all calendar quarter years beginning October 1, 1956, and ending December 31, 1965, the returns understating the amount of Excise Tax payable by FRUEHAUF CORPORATION totaling $12,344,587.31.

During the course of pretrial discovery proceedings in the criminal case the defendants therein sought to obtain from the Government various records and material within the possession of the Government which they claimed would supply information essential to their defense. The position of the Government was that these were not properly subject to discovery in the criminal case but they could be obtained under the provisions of the Freedom of Information Act. The defendants in said criminal case then filed the instant civil action against the Internal Revenue Service. (The Court, in the criminal case, denied the discovery there sought by defendants on the theory that the Government appeared to be willing to furnish the information sought, pursuant to the Freedom of Information Act.) Subsequent to the filing of the instant action under the Freedom of Information Act the Government's position is that the documents sought are not available to plaintiffs under the Freedom of Information Act.

In their Answers to Interrogatories filed November 27, 1973, at page 2 thereof, plaintiffs give a general description of said documents as follows:

> In general, Plaintiffs seek copies of unpublished private rulings and/or rulings, as defined in the complaint, originating in the Miscellaneous and Special Provisions Tax Division, Excise Tax Branch, Office of Assistant Commissioner (Technical), Internal Revenue Service, between January 1, 1947 and June 26, 1973 to manufacturers of automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, and tractors of a kind chiefly used for highway transportation in combination with a trailer or semitrailer, or to any trade association of any one or more such manufacturers. In paragraphs 5a(1)(a) through 5a(1)(h) of Plaintiffs' Complaint, the specific subject matters of rulings requested are described in detail.

The specific subject matters of the rulings requested are set forth in the paragraphs as above indicated. They relate to those types of determinations which plaintiffs conceive to be relative to their defense of the charges contained in the indictment in the criminal case.

The Government filed its Motion for Summary Judgment requesting dismissal on the grounds that the "requested documents are exempt from disclosure under Section 552(b)(3), Title 5 U.S.C. because of Section 6103 of the Internal Revenue Code of 1954."

The parties have filed extensive briefs herein, and the Court file contains numerous pleadings including various sets of interrogatories and answers thereto.

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Plaintiffs' Answers to Interrogatories filed November 27, 1973 (docket entry No. 18) contains the following paragraph, which we deem of controlling significance:

> The documents sought are essential to the proper defense of the criminal case in view of the fact that under the authority of *International Business Machines Corporation* v. *U.S.*, 343 F. 2d 914 (Ct. Cl. 1965), cert. den. 382 U.S. 1028, if rulings were issued to other taxpayers which provided a benefit to those taxpayers which Fruehauf did not enjoy, then Fruehauf is entitled to the benefit of such rulings. The basis for this theory is Section 1108(b) of the Revenue Act of 1926 which provides that if the Service has issued a ruling, Treasury decision or regulation holding the sale or lease of an article was not taxable and a taxpayer has parted with possession of an article relying upon the ruling, regulation, or Treasury decision, that such item was not taxable, then no tax shall be levied, assessed or collected. In the case of *International Business Machines Corporation* v. *U.S., supra,* the Court of Claims had presented to it the question of whether, if such a ruling were granted to a third party, the benefit of such ruling must also be granted to other taxpayers. The Court of Claims concluded that in view of the fact that a ruling, which had been issued to one taxpayer, could not be revoked retroactively, that such ruling must be made available to other taxpayers during the period it was unrevoked in order to carry out the intent of Congress that excise tax not be applied in a discriminatory manner. Thus, under the authority of such case, private rulings which were issued and which remained unrevoked during any period covered by the criminal case must be available to Plaintiffs. Plaintiffs have reason to believe that private rulings which would be favorable do exist, and Plaintiffs are entitled to rely upon such rulings in their defense in the criminal case.

The Freedom of Information Act, 5 U.S.C.A. § 552 (b) sets forth nine exceptions to the statutory disclosure act. The one relied upon by the Government—

> "(b) This section does not apply to matters that are—
>
> * * * * *
>
> "(3) specifically exempted from disclosure by statute;" 5 U.S.C.A. § 552(b)(3).

is relied upon, the Government says, because of 26 U.S.C.A. § 6103. We consider that none of the nine exceptions has application to the material here sought by plaintiffs and that 26 U.S.C.A. § 6103 provides for the protection of the privacy of persons filing *Income* Tax Returns. To the extent that any of the material sought by plaintiffs might constitute an invasion of the privacy of taxpayers there are means that may be employed to avoid such disclosure. In furnishing plaintiffs the information relevant to their defense there need be no violation of Section 6103 of Title 26 of the Internal Revenue Code.

The Sixth Circuit has provided us with guidelines and helpful discussion concerning the Freedom of Information Act in the case of *Hawkes* v. *Internal Revenue Service,* 467 F. 2d 787 (1972). Although the facts in that case are entirely different from the instant situation the opinion of the Court of Appeals in *Hawkes* convinces this Court that the material here sought by plaintiffs should be made available to them and that such material as they seek does not come within the nine exceptions set forth in the Act.

An order in accordance with the foregoing may be presented on notice.

THOMAS P. THORNTON,
United States District Judge.

Dated: January 11, 1974.

[Filed and Entered January 30, 1974]

In the United States District Court for the Eastern District of Michigan

Civil No. 4–70345

FRUEHAUF CORPORATION, A MICHIGAN CORPORATION, ET AL., PLAINTIFFS

v.

INTERNAL REVENUE SERVICE, DEFENDANT

Order

At a session of said Court held in the Federal Building, City of Detroit, County of Wayne, and State of Michigan, on January 30, 1974.

Present: Honorable THOMAS P. THORNTON, District Court Judge

Upon the considerations expressed in the Court's Opinion entered herein on January 11, 1974 and upon consideration of the entire record herein, it is,

ORDERED, That Defendant's Motion for Summary Judgment be and hereby is denied, and it is

FURTHER ORDERED, that pursuant to 5 U.S.C. 552 and Rule 65(a)(2) of the Federal Rules of Civil Procedure, Defendant, its agents, attorneys and employees are permanently enjoined from withholding the records requested by Plaintiffs and it is,

FURTHER ORDERED, that commencing from the date upon which Defendant is personally served with a true copy of this Order, and continuing for such rea-

sonable length of time as may be necessary, Defendant shall make available to Plaintiffs for inspection and copying, all of the following records and documents intact and without deletion, except for those items which, within said period of time, Defendant submits to the Court, or to a Special Master, to be appointed by the Court, sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the Court or his Special Master, as to whether the proposed deletions are justified under the Freedom of Information Act, together with a detailed written explanation of the justification for each deletion:

(1) All unpublished private rulings and/or letter rulings originating in the Miscellaneous and Special Provisions Tax Division, Excise Tax Branch, of the Office of Assistant Commissioner (Technical), Internal Revenue Service, which were issued between January 1, 1947 and to September 13, 1973 to manufacturers of automobile truck chassis, automobile truck bodies, truck and bus trailer and semi-trailer chassis, truck and bus trailer and semi-trailer bodies, and tractors of a kind chiefly used for highway transportation in combination with a trailer or semi-trailer, or to any trade association of any one or more such manufacturers, in which determinations were made of:

(a) All items includable or excludable in the price for which a taxable article is sold under section 4216 (a) of the Internal Revenue Code (or any predecessor section) and any Regulations issued pursuant thereto.

(b) The methods, means, formulae or procedures for determining or computing, by a manufacturer of taxable articles, the applicable constructive sales price, under section 4216(b), section 4216(b)(1), and section 4216(b)(2), of the Internal Revenue Code of 1954 (or any predecessor section), and any Regulations issued

pursuant thereto, upon sales by such manufacturers to:

(1) a retailer
(2) a wholesaler
(3) a wholesaler distributor
(4) a user or ultimate consumer

(c) The existence or non-existence under section 4216(b) of the Internal Revenue Code of 1954 (or any predecessor section), and any Regulations issued pursuant thereto, particularly (without limitation) Treasury Regulations Section 148.1–5 and Treasury Regulations 46(1940), Sections 216.8, 316.10, 316.12, 316.13, 316.14, and 316.15, of:

(1) a retailer
(2) a wholesaler
(3) a wholesaler distributor
(4) sales at retail
(5) sales at wholesale
(6) sales to wholesale distributors

(d) The methods, means, formulae, or procedures for determining or computing, by a manufacturer of taxable articles, the applicable exclusion of *local* advertising charges from the sales prices of taxable articles under section 4216(f) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(e) The methods, means, formulae, or procedures for determining or computing, by a manufacturer of taxable articles, the credit for tax paid on tires or inner tubes under section 6416(c) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(f) The definition of the term "the purchase price" as used in section 6416(c)(1) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(g) The definition(s) of taxable and nontaxable trailers, semi-trailers, truck and bus trailers and semi-trailer chassis, truck and bus trailer and semi-trailer bodies and containers under section 4061(a) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto.

(h) The methods, means, formulae or procedures for computing the applicable tax under sections 4061(a) and 4216(b) of the Internal Revenue Code of 1954 (or any predecessor section) and any Regulations issued pursuant thereto on a projected or estimated basis instead of upon an article by article basis.

The terms "private rulings and/or letter rulings" shall include (without limitation) both ordinary letter rulings, unpublished private rulings, and those portions of the responses to Technical Advice requests that are or were intended for issuance to taxpayers.

(2) The files including correspondence, analysis and submissions of fact applicable to the issuance of:

Revenue Ruling 62–68, 1962–1 CB 216
Revenue Ruling 68–254, 1968–1 CB 479
Revenue Ruling 68–202, 1968–1 CB 477
Revenue Ruling 68–519, 1968–2 CB 513
Revenue Ruling 69–394, 1969–2 CB 206
Revenue Ruling 54–25, 1954–1 CB 258
Revenue Ruling 54–448, 1954–2 CB 412
Revenue Ruling 54–61, 1954–1 CB 259
Revenue Ruling 283, 1953–2 CB 425
Revenue Ruling 62–221, 1962–2 CB 251
Revenue Ruling 63–238, 1963–2 CB 519
Revenue Ruling 58–287, 1958–1 CB 426
Revenue Ruling 60–241, 1960–2 CB 329
Revenue Ruling 59–74, 1959–1 CB 350
Revenue Ruling 59–163, 1959–1 CB 353
Revenue Ruling 65–9, 1965–1 CB 491

Revenue Ruling 60–185, 1960–1 CB 412
Revenue Ruling 69–580, 1969–2 CB 209
Revenue Ruling 69–568, 1969–2 CB 209
Revenue Ruling 71–240, 1971–1 CB 372
Revenue Ruling 68–509, 1968–2 CB 508
Revenue Ruling 70–54, 1970–1 CB 218
Revenue Ruling 73–231, IRB 1973–21, 11

(3) Communications with respect to such private rulings and/or letter rulings received by the Internal Revenue Service from persons outside the Executive Branch of the United States Government (including, without limitations, members of Congress, Congressional staff members, and persons acting on behalf of the parties seeking rulings), together with the responses of the Internal Revenue Service to these outside communications. The communications requested include (without limitation) letters, conference memoranda, and memoranda of telephone conversations, and it is,

(4) All items of the letter ruling indexing systems of the Internal Revenue Service as will enable Plaintiffs to ascertain whether additional unpublished private rulings and/or letter rulings, similar to those ordered available above, have been issued by the Treasury, including, but not limited to;

(a) the index-digest card file which is maintained by the Office of the Assistant Commissioner (Technical) involving "reference" (formerly "precedent") private and/or letter rulings files; and

(b) the sets (blocks) of cards maintained in alphabetical order by the Technical Records Section of Defendant that separately refer to all Technical files by taxpayer name and date of the file, beginning in 1954, involving "routine"

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(formerly "non-precedent") private and/or letter rulings files, and it is

FURTHER ORDERED, that Defendant shall not destroy or otherwise dispose of or alter any of the foregoing records and documents without the prior approval of this Court, after notice to the Plaintiffs.

(S) Thomas P. Thornton
THOMAS P. THORNTON,
Judge.

A true copy, Henry R. Hanssen, Clerk, by V. Barrow, Deputy Clerk.

APPENDIX B

In the United States Court of Appeals for the Sixth Circuit

No. 74–1474

FRUEHAUF CORPORATION, WILLIAM E. GRACE AND ROBERT D. ROWAN, PLAINTIFFS-APPELLEES

v.

INTERNAL REVENUE SERVICE, DEFENDANT-APPELLANT

On appeal from the United States District Court for the Eastern District of Michigan

Decided and Filed June 9, 1975

Before MILLER, LIVELY, and ENGEL, Circuit Judges.

ENGEL, Circuit Judge. In this action brought by plaintiffs under the Freedom of Information Act, 5 U.S.C. § 552, (F.O.I.A.), the Internal Revenue Service appeals from an order of the district court requiring that agency to make available for inspection and copying a large number of documents in the possession of the Excise Tax Branch of the Miscellaneous and Special Provisions Tax Division of the Office of Assistant Commissioner (Technical). The documents ordered to be produced consist primarily of unpublished private and letter rulings relating to the manufacturers excise tax as imposed upon sales of trucks and trailers, but also include the files underlying twenty-three published Revenue Rulings, communications between the Service and persons outside the Executive

Branch, and indices and card files relating to the foregoing. The complete list of documents is described in the court's order, which is attached hereto as Appendix A.

The information sought does not pertain to the federal income tax, but is confined to interpretations of the manufacturers excise tax under Section 4061 (a) of the Internal Revenue Code, 26 U.S.C. § 4061 (a), and the definition of the price for which an article is sold as set forth in Section 4216.

The order appealed from specifically provides that the described documents shall be made available intact and without deletion,

> "except for those items which, * * * defendant submits to the court * * * sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the court * * *, as to whether the proposed deletions are justified under the Freedom of Information Act together with a detailed written explanation of the justification for each deletion * * *"

The government opposed disclosure below, claiming that the documents requested were exempt under one of the nine exemptions to the Act, § 552(b)(3), which provides that the Act is not applicable to matters "specifically exempted from disclosure by statute". The Service urges that, as described in the district court's order, the documents are exempt under the Internal Revenue Code, 26 U.S.C. §§ 6103, 7213. Section 6103 provides in part, that

> "* * * All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, and subchapter B, chapter 37, and chapter 41, shall constitute public records and shall be open to

> public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President." 26 U.S.C. § 6103(a)(2)

Section 7213 provides for criminal penalties for disclosure by government employees of certain information, including income returns, sources of income and profits.[1]

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[1] 26 U.S.C. § 7213, Unauthorized disclosure of information. Subsection (a)(1) provides:

"(a) Income Returns—(1) Federal employees and other persons.—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

Subsection (b) provides: "(b) Disclosure of Operations of Manufacturer or Producer.—Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dismissed from office or discharged from employment."

The government further asserts that the district court had and should have exercised equitable discretion to withhold the relief even if it were otherwise called for under the Act.

We reject both of these contentions and affirm the judgment of the district court. We hold that while the district court erred in construing 26 U.S.C. § 6103 as extending the protection of privacy to persons filing income tax returns only, its order for disclosure was nonetheless proper when construed to reserve in the court the right, upon *in camera* inspection, to deny disclosure of any specific documents in which the deletion of protected matter will not suffice to preserve any exemption which may be validly asserted with respect thereto.

We also reject the appellants' argument that "even assuming, *arguendo,* that the documents in issue are not specifically exempt from disclosure by statute, * * * the district court erred in failing to exercise its equitable jurisdiction to decline to issue an order compelling disclosure".

It is important to understand at the outset what this appeal does not involve. First, no issue is raised that the documents sought, as numerous as they may be, are not "identifiable records" within the meaning of § 552(a)(3). Second, no constitutional question is presented. Third, no claim is made that *in camera* inspection by the trial court to sift out privileged matter is forbidden, as is classified matter under subsection (b)(1) of the Act, *EPA* v. *Mink,* 410 U.S. 73 (1969).

Finally, while the Act lists nine exemptions to which its provisions shall not apply, the Internal Revenue Service relies only upon that contained in subsection (b)(3), matters "specifically exempted from disclosure by statute".

As the Supreme Court pointed out in *EPA* v. *Mink, supra,* the F.O.I.A. was enacted in response to the shortcomings of its predecessor, Section 3, which "was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute". 410 U.S. at 79. While the Act may have its imperfections in drafting,[2] the intent of the Congress that issues of construction be resolved in favor of public disclosure is unmistakable, and our circuit as well as others, has consistently recognized this. *Tennessean Newspapers, Inc.* v. *Federal Housing Administration,* 464 F. 2d 657 (6th Cir. 1972); *Hawkes* v. *I.R.S.,* 467 F. 2d 787 (6th Cir. 1972); *Soucie* v. *David,* 448 F. 2d 1067 (D.C. Cir. 1971).

The Act places upon the agency the burden to impose specific objections to disclosure, and to show that nondisclosure is permitted under one of the nine specifically enumerated exemptions. *EPA* v. *Mink, supra,* at 79. The policy of the Act favors disclosure and thus mandates that the exemptions be construed narrowly. *Soucie* v. *David,* 448 F. 2d 1067 (D.C. Cir. 1971).

The government contends that the letter rulings and other materials sought constitute "returns" within the meaning of 26 U.S.C. § 6103, or are exempt as privileged material under 26 U.S.C. § 7213. It asserts that certain of the documents may be attached to an excise tax return or may involve information contained in a tax return, and claims broadly that it was the "obvious intent of Congress to restrict access to all documents associated with the administration of the tax laws".

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[2] This is the position taken by Professor Kenneth Davis. See Davis, *Administrative Law Treatise* (1970 Supplement) at 115.

While an injunction has been issued and stayed pending appeal, neither the trial court nor this court has had the opportunity to examine the precise documents desired to determine whether they are subject to disclosure. We thus find ourselves in much the same position as we did in *Hawkes* v. *Internal Revenue Service,* 467 F. 2d 787 (6th Cir. 1972). In that case disclosure of certain portions of an Internal Revenue Manual by a taxpayer indicted for tax fraud was opposed on the assertion that disclosure was excluded under 5 U.S.C. § 552(b)(2), excluding matters "related solely to the internal personnel rules and practices of an agency". As Judge Celebrezze there observed:

> "Neither this court nor the district court has examined the Manual portions sought. It is therefore impossible for us to state authoritatively which portions are subject to compulsory disclosure, although it would appear that several sections at least of the Manual would provide guidance as to the Service's understanding of substantive law and relevant procedures and would therefore be subject to disclosure under (a)(2)(C). *In camera* [italics in quoted text] inspection of the Manual would provide a basis for application of the guidelines for disclosure suggested in this opinion and a remand for such inspection and evaluation seems reasonable." *Hawkes* v. *I.R.S. supra,* at p. 796.[3]

Formulated on the guidance of *Hawkes, supra,* the district court injunction permits submission to the

[3] *Hawkes* was remanded to the district court for *in camera* examination. Following such examination the district court concluded the materials were subject to disclosure and ordered the materials made available to plaintiff. This court affirmed that decision in *Hawkes* v. *I.R.S.*, 74-1190 (decided and filed December 23, 1974).

court for *in camera* inspection of any documents in which the Service believes deletions are justified.

The position of the Service is broad rather than specific, perhaps in part because the order itself deals more in categories than in specifically identified documents. For this reason we conceive our role at this stage to be limited largely to determining whether the types of documents described are so clearly within the exemption of 26 U.S.C. §§ 6103 and 7213 that the injunctive order appealed from must be reversed and the suit under the Act dismissed. We determine that the Service has not maintained its burden of showing, at this stage, that the material requested is within the specific exemptions of the statutes relied upon so as to make reversal necessary.

The nature of certain of the documents sought, however, is known and can be ruled upon on a categorical basis. Letter rulings, as such, have a rather well defined meaning. The Secretary of the Treasury has defined a letter ruling as:

> "A written statement issued to a taxpayer or his authorized representative by the national office which interprets and applies the tax laws to a specific set of facts." Treas. Reg. § 601.201(a)(2).

See also *Tax Analysts and Advocates* v. *I.R.S.,* 505 F. 2d 350, 352, (D.C. Cir. 1974).

We hold that letter rulings are not "returns" within the meaning of 26 U.S.C. § 6103 and hence are not exempt for that reason under § 552(b)(3) of the Act. We are in agreement with the rationale of the District of Columbia Circuit in *Tax Analysts and Advocates* v. *I.R.S.,* 505 F. 2d 350 (D.C. Cir. 1974), and with that of Professor Davis in his treatise, Davis, *Admin. Law Treatise,* (1970) § 3A.9 at 130. In *Tax Analysts,*

supra, the court emphasized that such letter rulings are generated by the agency rather than the taxpayer. It further stated:

> Letter ruling are issued at the request of taxpayers seeking advice as to the tax consequences of specific transactions. This information provides guidance in planning and conducting their business affairs and, if the transaction is consumated, aids in preparation of their tax returns. The fact that taxpayers may elect to follow the Internal Revenue Service's recommendations that letter rulings be attached to returns containing information about the transactions referred to in the letter rulings does not *deprive a letter ruling of its separate status as a "final opinion" and "interpretation" nor does it make the attachment part of a return.* Attachment is to alert the District Director of the Internal Revenue Service that a letter ruling had been issued. The appropriate District Director is always sent a copy at the time a letter ruling is issued to any taxpayer required to file a return in his district. 505 F. 2d at 354–355.

We also agree with the court in *Tax Analysts* that letter rulings are not rendered exempt by Treasury Regulation § 301.6103(a)–I(a)(3) (Feb. 8, 1972), which amended the earlier definition of "return" and broadened it. While certain letter rulings may fall within the literal language of that regulation, we agree that the regulations, promulgated here by the regulated agency, "cannot immunize letter rulings from disclosure under the Freedom of Information Act", beyond that which Congress intended to protect under § 6103. 505 F.2d at 354, n. 1.

The District of Columbia Circuit further ruled in Tax Analysts that, under §§ 6103 and 7213 of the Internal Revenue Code, technical advice memoranda written in conjunction with income tax returns were

exempt from disclosure under § 552(b)(3). We do not reach that precise question here as the order here most carefully limits disclosure to "those portions of responses to Technical Advice requests that are or were intended for issuance to taxpayers". So limited, and with the retained power in the court to make necessary deletions, we think such portions do not come within the exemption of § 6103.

In his memorandum opinion, the district judge below observed:

> "We consider that none of the nine exceptions has application to the material here sought by plaintiffs and that 26 U.S.C.A. § 6103 provides for the protection of the privacy of persons filing *Income* Tax returns. To the extent that any of the material sought by plaintiffs might constitute an invasion of the privacy of taxpayers, there are means that may be employed to avoid such disclosure. In furnishing plaintiffs the information relative to their defense there need be no violation of Section 6103 of Title 26 of the Internal Revenue Code." 369 F. Supp. at p. 110.

The quoted language is troublesome in two respects. First, we agree that probably none of the exceptions is applicable to the extent at least that it bars disclosure of the requested documents as a class or group. We do not read it as meaning, however, that a given specific document which is finally delivered over for *in camera* inspection may not contain material which is excludable as within one of the exempted categories. Indeed, so much seems to be recognized by the broad language of the order referring to "whether the proposed deletions are justified under the Freedom of Information Act." Second, it is apparent from an examination of the language of § 6103 that the district judge erred at least to the extent of holding that § 6103

(a)(2) applies only to income tax returns. It does not, but rather expressly applies as well to taxes imposed under chapter 32, which of course relates to excise taxes. Since, therefore, the possibility remains that the exemption of § 6103 may be found to apply to a specific document which may be delivered over for *in camera* inspection, the district judge will wish to bear this in mind during inspection. This is particularly true with respect to any inspection of files applicable to the issuance of the enumerated Revenue Rulings under Section (2) of the order. The order as entered, however, appears to retain sufficient flexibility to permit this determination to be properly made by the trial court.

A further complaint of the Internal Revenue Service is that the district court's opinion made no mention of its claim that a further exemption from disclosure of the requested documents is created by the provisions of 26 U.S.C. § 7213 (a) and (b). The government argues that "while concededly its specific terms do not encompass excise tax returns *per se,* logic dictates the conclusion that it applies to information submitted in connection with such returns."

Section 7213(a) quite expressly refers to *income* returns, both in its heading and repeatedly throughout the body of the text. Unlike Section 6103(a)(2), Section 7213(a) makes no reference to "chapter 32" or otherwise evinces an intent to include information regarding *excise* tax returns within its scope. Contrary to the assertion of the government, logic supports the more restricted meaning, especially since the section imposes criminal penalties. We have been shown no authority to the contrary.[4]

[4] *Tax Analysts and Advocates* v. *I.R.S., supra,* of course did not involve a dispute as to the applicability of § 7213 to excise taxes. That case involved documents related to income tax only.

Section 7213(b) is more general in scope than (a) and is not geared to the return of any particular tax. It is directed toward precluding disclosure of certain types of information obtained by officers or employees as a consequence of a visit by such persons to any manufacturer or producer in the discharge of official duties. The order as framed does not reveal that any such type information is contained within the documents affected. However, if upon *in camera* inspection, material covered by § 7213(b) should appear, we believe the order of the district judge retains sufficient flexibility in the court to protect against its disclosure.

Equitable Jurisdiction Issue

The government contends that if the documents in issue are not specifically exempt from disclosure by statute, the district court nonetheless erred in declining to exercise its equitable discretion to refuse disclosure, relying upon certain language in *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 20 (1974):

> "With the express vesting of equitable jurisdiction in the district court by § 552(a) there is nothing to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court."[5]

The Service also relies upon the comments of Professor Davis in his Administrative Law Treatise:

> "The equity practice is clear and strong. The court that has jurisdiction to enforce the information Act also has jurisdiction to refuse to enforce it whenever equity traditions so require." (1970 Sup.), § 3A.6, at 124

[5] The Service relies upon *Renegotiation Board* v. *Bannercraft,* 415 U.S. 1 (1974), as support for its claim that the power to

Many of the arguments proffered by the government in support of its contention that relief should be withheld here are those which have been considered and rejected by Congress. Indeed, the government argues not that the "equities" or facts of this particular case necessitate non-disclosure, but that the categories of documents requested should, for general policy reasons, be exempt. We find these reasons inadequate in light of the clear intent of Congress favoring disclosure.

The legislative history to the Act reveals that Congress did not intend general notions such as "public interest" to shield information from the public:

> "Section 3 of the Administrative Procedure Act, that section which this bill would amend, is full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as—'requiring secrecy in the public interest', or 'required for good cause to be held confidential.'
>
> "It is the purpose of the present bill to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld." Senate Rep. No. 813, 89th Cong., 1st Sess. at p. 3.

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grant equitable relief carries with it the power as well to deny it upon a showing of valid equitable considerations to the contrary. The case, however, involved the issue of whether equitable discretion could be employed to grant additional remedies and not whether the discretion would permit a withholding of relief under the Act.

The Internal Revenue Service urges that its letter ruling program will be destroyed if the rulings are disclosed. In addition to the fact that no proof of this apears on the record, this is an argument for the legislature, not the court.

As an alternative to an outright ban on all disclosures, the Service asks "that this court should at a minimum modify the district court order to preserve the confidentiality of documents and correspondence in the Internal Revenue Service's possession" primarily because, it urges, much of the information was submitted in the good faith belief that the documents would be kept confidential. In effect, the Service asks that any ruling which makes such documents generally disclosable should be prospective only, so that administrative procedures may be adopted to protect against unwarranted disclosure of confidential business information submitted by taxpayers and so that in the drafting of its rulings in the future, the Service can delete such confidential commercial and financial data as might otherwise have been incorporated in them.

We read this request as simply another way of saying that the plaintiffs should be denied the information they seek.[6] They did not come into court as champions of a cause, but as citizens seeking information to which they claim they were entitled under the Act.

The difficulty with the position of the Service is that it claims altogether too much protection from disclosure and offers altogether too little specific justifica-

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[6] The record does not contain a judicial finding that requests by taxpayers for letter rulings are in fact made upon the assurance that the rulings will be kept confidential. Indeed, the government admits that a small number of such rulings, after editing, are published each year by the I.R.S. The government does not state whether taxpayer consent is obtained. [Response to Request for Admissions, No. 14].

tion. This position is not unlike that rejected by this court in *Tennessean Newspapers* v. *Federal Housing Administration, supra,* in which Judge Edwards observed that "such a view, carried to its logical conclusion, would allow the District Court to review a petition for disclosure totally independent of the Freedom of Information Act and its purposes and standards."[7] 464 F. 2d at 661. While our ruling in that case must necessarily be understood in the context of the practical and equitable considerations set forth in *EPA* v. *Mink, supra,* we do not conceive that the traditional equitable powers of the district court justify it or us in adding a tenth or eleventh exemption to the nine specifically enumerated in the Act, nor do we conceive that we may postpone the effective date of its operation.[8]

[7] In *Tennessean Newspapers* v. *Federal Housing Administration*, 464 F. 2d 657 (6th Cir. 1972), the district court had ordered disclosure of an appraisal, but permitted the withholding of the name of the appraiser. We reversed, holding that in the context of that case, the district court was without power to "vary the standards" established by the Act by permitting non-disclosure "absent the applicability of one of the specific exemptions".

[8] The Service cites *Evans* v. *Department of Transportation of the United States*, 446 F. 2d 821 (5th Cir. 1971), *cert. denied* 405 U.S. 918 (1972), as authority that courts should not permit disclosure of information submitted with the understanding that it would be kept confidential. The difference between *Evans* and the facts here is apparent. *Evans* dealt with a specific document submitted by a confidential informer with the express reservation that his identity would remain confidential. Such information was specifically exempted under 49 U.S.C. § 1504. Further, it was held that the information sought in that case was a part of an investigatory file compiled for law enforcement purposes within the meaning of subsection (b)(7) of the Act. No claim under that subsection has been made in these proceedings to date.

Conclusion

In conclusion, we stress as we did in the first *Hawkes* case, 467 F. 2d 787, *supra,* that the merits of any claim of exemption of a particular document are not before us. See also *Renegotiation Board* v. *Bannercraft Co., supra,* at 26. Any such claims must yet be decided by the district court upon invocation of the *in camera* inspection provision in its order. We are satisified that the order as entered contains sufficient flexibility for its implementation to permit the express purposes of the Act to be carried out in a manner consistent with equitable principles and fairness to all involved. In addition to the guidance already available in the decisions of this circuit, we believe the district court will be able to draw upon the practical alternative remedies to an onerous document-by-document *in camera* inspection by the trial judge, as pointed out in *EPA* v. *Mink, supra,* 410 U.S. at p. 93. Imaginative procedures, such as those suggested in *Mink,* should in large measure alleviate the apprehended governmental burden and substantially reduce the 6,000 hours which its affiants estimate to be required to produce and examine the requested documents.

Accordingly, the judgment of the district court is affirmed and the case remanded to the district court for further proceedings.

APPENDIX C

In the United States Court of Appeals for the Sixth Circuit

No. 74-1474

FRUEHAUF CORPORATION, WILLIAM E. GRACE, AND ROBERT D. ROWAN, PLAINTIFFS-APPELLEES

v.

INTERNAL REVENUE SERVICE, DEFENDANT-APPELLANT

Before MILLER, LIVELY, and ENGEL, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said district court in this cause be and the same is hereby affirmed and the cause remanded for further proceedings.

It is further ordered that plaintiffs-appellees recover from the defendant-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said district court.

ENTERED BY ORDER
OF THE COURT
(S) JOHN P. HEHMAN
Clerk.

Entered: June 9, 1975.

APPENDIX D

[Filed, August 8, 1975, John P. Hehman, Clerk.]

In the United States Court of Appeals for the Sixth Circuit

No. 74-1474

FRUEHAUF CORPORATION, WILLIAM E. GRACE, AND ROBERT D. ROWAN, PLAINTIFFS-APPELLEES

v.

INTERNAL REVENUE SERVICE, DEFENDANT-APPELLANT

Before MILLER, LIVELY and ENGEL, Circuit Judges

Order

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit.

Accordingly, the petition for rehearing is hereby denied.

ENTERED BY ORDER OF
OF THE COURT
(S) JOHN P. HEHMAN
Clerk.

APPENDIX E

5 U.S.C. 552 [AS AMENDED BY SECTION 1(b) AND 2(c), PUB. L. 93-502, 93D CONG., 2D SESS., 88 STAT. 1561, 1564]. PUBLIC INFORMATION; AGENCY RULES, OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS

(a) Each agency shall make available to the public information as follows:

* * * * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; * * *

* * * * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute;

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

* * * * *

INTERNAL REVENUE CODE OF 1954, AS AMENDED (26 U.S.C.):

SECTION 6103. PUBLICITY OF RETURNS AND DISCLOSURE OF INFORMATION AS TO PERSONS FILING INCOME TAX RETURNS

(a) *Public record and inspection*—

(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

(2) All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, subchapter B of chapter 37 and chapter 41, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person, a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Secretary or his delegate. The Secretary or his delegate may prescribe a reasonable fee for furnishing such copy.

TREASURY REGULATIONS ON PROCEDURE AND ADMINISTRATION (26 C.F.R.):

§ 301.6103(a)–1. Inspection of returns by certain classes of persons and State and Federal government establishments pursuant to Executive order. (a) *In general*—(1) *Authority.* The President is authorized by subsection (a) of section 6103 to open to public examination and inspection returns in respect of the taxes described in paragraphs (1) and (2) of such subsection. In addition, section 6106 provides that returns in respect of the tax described therein (unemployment tax imposed by chapter 23 of the Code) shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns of the taxes described in section 6103, except that subsections (a)(2) and (b)(2) of section 6103, and subsection (a)(2) of section 7213 (relating to unauthorized disclosure of information) shall not apply.

* * * * *

(3) *Terms used*—(i) *Return.* For purposes of section 6103(a), the term "return" includes—(*a*) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and (*b*) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (*a*) of this subdivision. * * *